IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE SCHWARZ, deceased, by and through her Personal Representative, RICHARD SCHWARZ,	)	
Plaintiff,	)	Circuit Court
	)	Case No. 0002-01376
vs.	)	
PHILIP MORRIS INCORPORATED, a foreign corporation, and ROTHS I.G.A. FOODLINER, INCORPORATED, an Oregon corporation,	)	Appellate Case No. A118589
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

Volume 40-C

3:30 p.m. - 5:10 p.m.

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Roosevelt Robinson, Judge of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 3:30 p.m., Thursday, March 7, 2002.

* * *

Katie Bradford, CSR 90-0148
Official Court Reporter
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Source: http://www.industrydocuments.ucsf.edu/docs/kyxd0001

APPEARANCES:

Mr. D. Lawrence Wobbrock, Attorney at Law,
Mr. Charles S. Tauman, Attorney at Law,
Mr. Richard A. Lane, Attorney at Law,
Appearing on behalf of the Plaintiff;

Mr. James L. Dumas, Attorney at Law,
Mr. John W. Phillips, Attorney at Law,
Appearing on behalf of Defendant
Philip Morris, Incorporated and Defendant
Roths I.G.A. Foodliner, Incorporated.

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(Thursday, March 7, 2002, 3:30 p.m.)

P R O C E E D I N G S

(Court Reporter Estelle Keating reported Volume 24-B.)

(Whereupon, the following proceedings were held in open court:)

THE COURT: Let's bring the jury in, please.

(The following proceedings were held in open court, the jury being present:)

THE COURT: Counsel, you may proceed with your cross-examination.

MR. WOBBROCK: Thank you, Your Honor.

RICHARD CARCHMAN

Was thereupon recalled as a witness on behalf of the Defendant, and, having been previously duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. WOBBROCK:

Q Good afternoon, Dr. Carchman.

A Good afternoon.

Q Sir, you're no stranger to the courtroom,

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are you, on these kinds of cases?
A No, sir.
Q How many times do you think you have testified in a deposition or a trial?
A Two dozen.
Q Two dozen?
A Maybe more.
Q 25, 30 times?
A Maybe, yes.
Q And you're hired as an consultant on a daily basis, correct?
A Yes.
Q And what is your fee for a day?
A A little over $2700 a day.
Q And you limit your work to 100 days?
A I wish. It has turned out to be about 150.
Q 150 days, 50 weeks in a year, five days, 250 days, and if you make 2700 for 150 day's work, you are making about $350,000 for 150 day's work?
A I think that's correct.
Q About right?
A Yes.
Q Out of a total work possibility of about 250 days, you work about 150 days?

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A I charge for 150 days.
Q That's a step up from when you were a university professor?
A Yes, sir.
Q At that time you made about $70,000 a year?
A When I left the university that was my salary, not counting consulting.
Q You consulted for another $20,000?
A That's correct.
Q So you are now able to do about four times than what you are doing then?
A 15 years later, yes.
Q And you have stock options in addition, too?
A I do.
Q But you're paid as a consultant?
A I had a stock option when I was an employee that are still active, yes.
Q Those stock options have turned out to be good. Philip Morris' stock has gone up, Philip Morris Companies?
A Yes.
Q And in the last 15 years, it has gone up $10 a share or 15?

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A I don't know.
Q We have a graph that shows that. You are not aware of what exactly it is, though?
A No.
Q Jumping right to it, Doctor, without qualifying it and without calling it a risk factor, are you willing to say or admit on behalf of Philip Morris and to the American people that smoking causes lung cancer?
A Yes.
Q You've been around, sir, so you have probably seen Exhibit 12. Mr. Weissman's statement, 1954, says, "'The cigarette industry would stop business tomorrow if it thought its product was harming smokers,' Mr. George Weissman."
A Weissman.
Q Did you know him?
A I met him once.
Q Now, that you publicly admitted that cigarette smoking causes lung cancer without qualification, is Philip Morris willing to stop business tomorrow?
A No.
Q Why not?
A I can't tell you why they specifically

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won't. I mean, but I think that the people I have spoken to who are responsible for Philip Morris feel that Philip Morris does the best it can with the product that it sells.

Q That wasn't a true statement when it was made, was it?

A I have no idea.

Q Philip Morris has indicated in the last, what, 18 months thereabouts maybe 20 months on its Web site that it agrees with the authorities that say smoking causes lung cancer?

A It agrees with the overwhelming medical and scientific evidence, yes, sir.

Q That wasn't always its position, was it?

A That's correct.

Q In fact, it changed that position within, say, the last 20 months?

A That's correct.

Q When it had that position -- or when it changed that position, do you know of any publication, any magazine, for example, where it has said what it says on the Web site?

A I am not sure I understand the question.

Q Do you know what the statement on the Web site says?

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A Absolutely.
Q Have you ever seen it published in any print media?
A No, but that doesn't -- no, I haven't.
Q There was a schoolteacher in here today who is retired. I don't know if you heard this or not, somebody told you?
A No.
Q He said he didn't know Philip Morris' new position, and he doesn't use a computer. He is a retired man of probably about 62 or thereabouts.
Do you know if Philip Morris has any plans to publicize the statement that you just made to the rest of the American people, so that people like him who is a schoolteacher, who is still a schoolteacher, a substitute teacher, would have this knowledge?
A I believe there is a 1-800 number because the question came up about those people who don't have computers. They made a 1-800 number available. How they let people know about that and to the extent that it is operational, I don't know.
Q Certainly, I know you know of this.
A Yes.
Q I don't intend to ask any detailed questions right now about it except do you know that

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it was published in 448 papers in the United States when it was published?

A I have heard that and read that, yes.

Q Do you know if Philip Morris has an intention to publish in the same way that it published this to the American people where it said, and I know you know about this. "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."

Do you know if they have an intention to publish the acknowledgment that you just stated in open court, that smoking causes lung cancer, on the same basis that they published this thing?

A I am not aware of anything like that, sir.

Q And I think I heard you say in your direct testimony that Philip Morris now acknowledges that smoking is addictive?

A That's correct.

Q Do you know if they have any plans to put that out to the American people on the same basis they put this Frank Statement?

A Not that I am aware of.

Q Can you tell this jury that you have studied at Philip Morris and have determined the dosage of cigarette smoke that it takes to cause lung

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cancer? The amount of cigarettes or the amount of smoking of certain cigarettes is that information known to you?

A It is only know to me approximately based on my reading of the literature.

Q But you would agree, sir, that same literature -- and I think you testified on direct that back in the 1950s, it was known that cigarette smoking, through epidemiology, caused lung cancer?

A That's correct.

Q And so if the study had been done with the intensity that you've now described to the jury about that subject, since the late 1950s or mid-1950s, we can call it '58 or '64 or '55 or whatever. If the study had been done by the company that you now or formerly worked for, that you now consult with, for the last 45 or 50 years with the resources that that company has, its European laboratories, its groups of scientists, they would be a lot farther ahead than they are now, wouldn't they, sir?

A It's possible.

Q And yet in that same period of time there has been testimony by Dr. Burns that 15 million people have died prematurely from smoking-related disease. If your company had applied its resources and

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ingenuity, and its talent and its money, it's possible that number could be vastly reduced because you would have solved that problem or at least come to the realization that it wasn't solvable and withdrawn your product?

A If I understand your question, applying Philip Morris' current resources 50 years ago, would we be farther ahead than we are now? And it could be so; but, of course, Philip Morris didn't have the resources it has today 50 years ago.

Q One of the reasons you're not in that spot is because it has been your company's strategy until very recently because of this kind of situation, a trial in a courtroom before the citizens of this country, to deny smoking causes lung cancer. And, therefore, not do certain research that its done now for fear that it would be discovered; isn't that true?

A Not that I am aware of.

Q Well, we'll talk about that a little later. But you would admit, sir, that this is a new strategy to come into a courtroom and admit as you have that smoking causes lung cancer?

A Forgive me, if you are asking me has the change in policy and public statement as evidenced on the Web site been due to litigation, I'm the wrong

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person to ask.

If you ask me, from my perspective, why it was done, I would say it was done to rebuild some bridges with the scientists and the public health community to sort of re-engage ourselves, whether other people in Philip Morris were also happy about this, because it helps or they think it helps in litigation. I can see -- I can see that possibility. But from my perspective, I am pleased as punch that it's there because we now have a chance of reconnecting with people.

Q And if your lack of connection with people in the past has been because people had thought that you folks were not truthful; and if, in fact, you weren't truthful, do you think your company should be held accountable for that?

A Our statements in the past, as I think I discussed today or yesterday, had nothing to do, from my perspective, with telling the truth or not telling the truth. As I said, we emphasized what wasn't known; the public health community focused on what was known. And that friction basically came to a head in the early '80s, and things started to drift apart.

Whether other people felt it was because they thought we weren't telling the truth, our

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position was just not acceptable to them. I am not in a position to judge what somebody thought about whether we were telling the truth or not.

I can judge as to whether somebody would think that this is an acceptable or unacceptable position. I would say for most of the public health people, it became an unacceptable position.

Q You would agree that your company was in the vast, vast minority, your industry, when it came to the acknowledgement of smoking as a cause of lung cancer?

A Yes.

Q It was way out there by itself?

A Yes.

Q And you would also agree, as a man who knows the difference between right and wrong, that if your company was wrong for those years, had wronged people, had misled young people, had led them into addiction and diseases and that that was wrong, you would agree that you should be held accountable, would you not?

A If it was wrong, if there was intent to mislead, then I would agree with you. But the point I made earlier, that -- we weren't scientifically wrong then and we're not scientifically wrong now. As you

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pointed out when you asked me had there been any new studies, and I said, "No."

What's happening is that we have dropped our emphasis on what was not known, what wasn't known 50 years ago remains unknown today. And that distinction has gotten in everybody's way in trying to move toward a harm-reduced product.

We stopped it and things, I believe, are starting to happen in the right direction. But it was not, from my perspective, that we lied or intentionally misled, as I would use those words.

Q You are aware of President Campbell, of the former president or CEO of Philip Morris?

A USA, Bill Campbell.

Q Yes.

A Yes.

Q USA, Philip Morris USA, meaning the tobacco company?

A USA tobacco.

Q USA tobacco, not worldwide tobacco, USA tobacco?

A That's correct.

Q And you're aware of the Waxman hearings of on April 14th of 1994?

A Yes, sir.

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Q And I think on the 27th of that same month?
A I knew it was that time period.
Q Another day earlier in March?
A It could be, yes.
Q Did you ever watch the videotapes of your former president give testimony?
A I have seen it on television.
Q And you were working there at that time, weren't you?
A I was an employee of the company, yes.
Q And did you ever have occasion to talk to Mr. Campbell?
A No, not at that time and not about that.
Q At any time, did you have occasion to talk to him?
A Yes.
Q Did you talk to him before and after he made that presentation to the Waxman hearing?
A No, sir.
Q Neither before or after?
A That's correct.
Q If you wanted to, could you have?
A Yes.
Q Could you have sent him a memo?

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A I could have, yes.
Q And April 14th of 1994, you saw him under oath testify before the Waxman hearing that smoking did not cause lung cancer and that smoking was not and addictive. Do you recall that?
A No. I only saw it on television after that and my recollection was that he used slightly different words. I think he used something to the effect that he had said it had not been scientifically proven.
Q And the jury has seen it twice, so we can quibble about what he said. I don't mean to misstate what he said, but that was April 14th of 1994, and some time in late '99, or early 2000, your Web site went up and acknowledged for the first time that smoking causes lung cancer and smoking is addictive, correct?
A Yes, sir.
Q What scientific discovery occurred between those two dates, '94 and 2000, that allowed you to make that change?
A There were no new scientific discoveries in that time period.
Q The decision to make that change was, in fact, not a scientific decision; but was, in fact, a

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business decision mwas is not, sir?
A Yes, sir.
Q It was a business decision by a fellow that was also a lawyer, correct?
A You have to be more specific.
Q Well, a fellow by the name of Parrish, I believe, was involved in that, was he not?
A Mr. Steve Parrish?
Q Yes.
A I think he practiced law at one point in his life, yes.
Q And he was a lawyer and a business person working with Philip Morris?
A He was -- he is -- was then and remains now an employee. And I think he is the head of Corporate Affairs.
Q Do you find it unusual that a scientific question of such import is ultimately decided by a lawyer?
A I am not sure I would say he made the decision since scientists were asked by a number of people, including lawyers, I believe, including Mr. Parrish, and I was involved in that, and whether he made the final decision or not, I knew he was part of the decision-making process, but there were

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consultations with scientists in Richmond about the wording of the Web site.

Q Do you find it at all unusual that the lawyers were deep in the science of Philip Morris science for many years?

A What lawyers deep -- when I was at Philip Morris, the only lawyers, aside from litigation, the only lawyers I dealt with were on regulatory issues. So when OSHA, or the National Toxicology program was doing things, then the lawyers got involved, because there were regulatory implications, but not to do anything -- having nothing to do with the science itself.

Q You reviewed many documents, you said, when you went to work for Philip Morris?

A That's correct.

Q Have you reviewed documents that this jury has seen by a Pat Sirridge that talked about how Dr. DeNoble's work was honing the tool to be used against the industry?

A I am not sure I remember the verbiage. I became aware of that memo as a result of litigation, not in the normal course of my reviewing of the scientific files.

Q We'll look at a couple of those as we move

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ahead here. This decision that you talked about to admit smoking causes cancer you indicated is motivated by a desire to reconnect with the scientific community?

A Yes.

Q Have anything to do with a freight train?

A I am not sure I understand.

Q Have anything to do with a freight train called the Attorney General's cases and the Master Settlement Agreement?

A I don't know. I am the wrong person to ask that question. I was involved in other aspects of this change. In addition to the Web site and the motivating feature of that was a communication with the United States Congress that the company of Philip Morris had been criticized for undermining the public health message.

And the company had taken a position which it communicated to the U.S. Congress, that we would do our best to try not to do anything publicly that would undermine that message. To me, the Web site was a logical step, next step in the behavior of the company trying to keep the commitment to the Congress.

Q And the Master Settlement Agreement, you are well aware, required that all litigation documents

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previously produced in any case be made public on the Internet, correct?

A Yes.

Q And you are well aware before that time, there were sometimes a practice in your company, as you mentioned with the ingredients and we'll look at another document that is very similar, to take documents and send them to lawyers, so that people like my client, through me, when asking your company to produce them, you would say, "Can't do it, lawyer-client privilege."

You know that practice existed for years, don't you, sir?

A No, I actually don't. And I'm not a lawyer. So when you say lawyer-client privilege, my eyes -- my eyes sort of glaze over. But if you -- because I asked a related question about that because of some INBIFO documents and litigation, you know, very famous tobacco litigation in which Philip Morris was involved in many, many years ago.

The documents in INBIFO were utilized, and that was a decade or more ago. So the availability of the documents at INBIFO, because they were at INBIFO, as far as I can tell, did not pose any barrier that a trial lawyer got in a trial lawyer's way. I am

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thinking of the Cipollone case.
Q You know, sir, that the Cipollone documents were kept under seal or only produced to the Cipollone family, and kept under seal until the Master Settlement Agreement required that they be released and made public?
A I did not know that.
Q Well, you do know this, sir. And I think that most people in the room probably do, that when you communicate with a lawyer usually, whether you send him documents, letters, communications or you talk to the lawyer, it is much like talking to your doctor. It is secret and privileged, isn't it?
A I don't know. I haven't -- you know, when I was an employee of Philip Morris, when I dealt with lawyers, it had to do with regulatory issues, and I just don't remember that kind of atmosphere. When I got involved in litigation that was clearly -- those things that were discussed had a different color, a different color to them.
Q All right. Well, putting that all aside, you know that the Master Settlement Agreement, one of the terms was to make sure that all the documents that had been produced in all the prior litigation that had been kept under seal be made public?

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A If you mean the Minnesota Depository?
Q Yes.
A Yes.
Q In fact, your company fought that all the way to the U.S. Supreme Court and lost. And then had to make those documents public, didn't they, sir?
A You know more than I do.
Q One of the central issues in the strategy that your company kept pursuing for years and years was to deny addiction of its product, because if you were to admit that, it would make it impossible to defend a case on the grounds that you are trying to defend this case, and have tried defend every other case.

And that is, it's the free choice of the smoker whether they continue to smoke or not. You recognize that as the constant refrain and theme of your prior company strategy in court, do you not?
A Again, I am the wrong person. I don't believe anybody ever discussed with me overall legal strategies.
Q Well, let me ask you if you've seen this document, sir. This is September 9th, 1980, and this is a memo from a Mr. Knopick to a Mr. Kleopfer. It's been established, the institute reference there is to

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the Tobacco Institute. Do you know what that is? Do you know what the Tobacco Institute is?

A Yes, yes.

Q Tell the jury, would you.

A The Tobacco Institute is a tobacco trade industry arm that was involved in public pronouncements. I think that's --

Q Public relations?

A Thank you.

Q It says, "Attached please find a technical review which led to Victor Cohns," C-o-h-n-s, "surprise story of 8-30 about the National Institute of Drug Abuse, wants 'addictive' added to the cigarette warning."

And then on the back page, "I feel badly about our own lack of intelligence gathering in the situation, but I don't think the questions I now raise are academic."

Shook, Hardy, do you know who they are, sir?

A Shook, Hardy is a law firm that represents Philip Morris.

Q "Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in any lung

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cancer cigarette case. We can't defend continued smoking as free choice if the person was addicted."

Have you seen this before?

A No.

Q This is the first time you have ever seen it?

A Yes.

Q But you testified in court before that you don't believe that nicotine was necessarily addictive; isn't that true?

A That's correct. I think -- that is an over simplification. What I have said in court when asked did I think smoking was addictive, I said, "Yes." I was asked, "Is nicotine addictive?" My response was, "I believe in some people it probably is."

Q In those people who it's addictive, you would agree that it limits their ability to choose whether they want to -- whether they can quit or not. They maybe want to quit, but they can't. Would you agree with that?

A In terms of my understanding of the word "addiction," there is the inference of a potential loss of control. So for some individuals, whether it is because of smoking or nicotine or something, there

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is an inference of some degree of loss of control.
Q But just your basic understanding, you acknowledge, do you not, that nicotine is an addictive substance and is the reason people smoke.
A As I said, I think in some people nicotine is the reason people smoke. Is nicotine an addictive substance outside of the context of a cigarette? I think there is a lot of practical evidence to suggest that's not true. That's not true at all.
Q Well, the Next cigarette didn't fly, did it?
A That's correct.
Q And it didn't fly because it was selling cancer without addiction, correct?
A Absolutely not. If I might just take a second, the Next cigarette -- and if you heard the technical pieces, I will just blow right over that. We removed about 97 percent of the nicotine. And people didn't like it.
Then internally in Philip Morris, they added the nicotine back and we evaluated it inside. Adding the nicotine back to the level it was before did not improve the acceptability of the product. My conclusion, in looking at all of that, is that the process that we used for extracting the tobacco

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sufficiently modified the tobacco that you couldn't reconstitute it. And that it was a change, not just in the amount of nicotine, but a sufficient change in the nature of the product as to be unacceptable.

Q It was predictable you would not be able to sell the Next cigarette because the thing your company sells most is nicotine; isn't that true?

A Predictable? I find it hard to believe. When I first came to the company, they were heavily into developing the process. And I basically asked the question, "What happens if people don't like this product?" And they said, "We have figured out a way, we think, to take out the nicotine because our consumers want to smoke a cigarette without nicotine."

So they went ahead and they did this. And when the consumers didn't like it and they added nicotine back and they still didn't like it, it didn't answer the question as to whether at least the people that tried to use this product smoked it for nicotine clearly there was something else going on in here, more than simply removing the nicotine.

Q Do know who Tom Osdene was?

A He is still around. I knew him then, and I haven't spoken to him --

Q A high level person in your company?

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A He was a high level person in R & D, yes.
Q He believed that the thing that your company sold the most was nicotine, didn't he?
A I don't know.
Q You don't know that?
A No.
Q Is your position similar to his or are you higher than he was?
A I was higher than Tom.
Q How many rungs up?
A I don't know. It is probably not comparable, because he left the company so many years ago and the whole structure has changed. I think he left as a vice president, but not all vice presidents are equal. I was a higher vice president than Tom.
Q Did you work there at the same time?
A We overlapped early on. When I came, he was no longer in R & D. He was in another organization, a scientific organization in Richmond, but not in R & D.
Q Did he tell you that the thing you sell the most is nicotine?
A No, he never communicated that to me.
Q Would it be a surprise to you if he wrote that down in a memorandum of August 12th? This is

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Exhibit 204.
A Actually, in my state, hardly anything would surprise me.
Q You can see it is to Dr. Seligman, who is also vice president of R & D, was he not?
A At that time, he was the head -- Dr. Seligman was the head of R & D, yes.
Q Doctor --
A If I can just look at this just a little bit just to refresh.
Q I'll just move it up because I am going to direct your attention to Item 5.
A Okay.
Q Do you see where it says there, "Nicotine program includes both behavioral effects as well as chemical investigation. My reason for this high priority is I believe the thing we sell most is nicotine."
A Yes, sir.
Q Was that ever communicated to you?
A By Dr. Osdene? No.
Q Anybody else?
A Oh, sure. We had lots of conversations with scientists about the question of nicotine. And some people agreed with Tom and other scientists

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didn't.
Q And so when you were there, you were aware that your company at least in some people's eyes was selling a substance that at least in some people's eyes could addict people?
A Yes.
Q And at least in some people's eyes, because they were addicted and smoked it for a number of years, would kill them?
A Yes.
Q And as to the -- this is a document, I'm sorry. This is 1966, Myron Johnston. You've heard of him?
A I knew Myron.
Q Dr. Dunn?
A I never met Dr. Dunn.
Q How would you describe Myron Johnston, his job title?
A He was a demographics person. If I had a question that required how many people are smoking in Brooklyn, New York, I would go to Myron and he would give me that information.
Q If you wanted to know the penetration of Marlboro in the 15-year-old market, you could go to Myron, too, couldn't you?

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A I don't know. I never did that. The only information I got on market penetration were things that I read in FTC publications.
Q Not in your area, not in your area of responsibility. Is that what you are saying?
A No. No. I don't remember anybody ever talking about 15 year olds.
Q Do you remember anybody talking about the concern that the number of 16 and 17 year olds was falling off; and, therefore, the sales of Marlboro products was not going to be as great?
A I may have. I don't recall it at the present time. I may have seen something like that.
Q Anyway, back to this subject, the market potential of a health cigarette, 1966. Are you familiar with this document?
A I have read it at some time in the past, yes.
Q "A cigarette that does not deliver nicotine cannot satisfy the habituated smoker, and cannot lead to a habituation; and would, therefore, almost certainly fail."
Do you see that?
A That is what it says, yes.
Q And have you seen other documents that

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talk about the necessity of having a nicotine delivery device obviously contain nicotine if it is going to be successful. Dr. Dunn's memo is in that regard?

A Yeah. Dr. Dunn's flowery verbiage. I was never really sure whether that was his opinion or it was the way he was representing the scientific view of it, but I never spoke to him about it. I never met him.

Q But at least in some people's minds, you could predict that the Next cigarette was going to fail because you couldn't sell it without nicotine?

A In some people's minds in the company there was concern about that, yes.

Q And are you aware, sir, that there is a large body of research, both within your company and outside your company, that says that people smoke for a minimum amount of nicotine a day? They need that minimum amount of nicotine. Are you aware of that?

A I am aware of the internal data. I am not aware of any data about -- that would support that. As to the data on the outside, there is speculation as to that and what that level may be, but I am not aware of any scientific data outside or inside that says this is what it is. These are the levels that are necessary for or below which it is not.

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Q If Dr. Benowitz were in this courtroom and said that it's around a milligram per cigarette, that people that are addicted need around 20 milligrams a day, would you disagree with that?

A Well, outside of this courtroom, just Dr. Benowitz and myself, I would basically say, "That's an interesting hypothesis." In fact, we have made cigarettes for Dr. Benowitz to try to address this particular question with different amounts of tar and nicotine and different amounts of nicotine to tar to help clarify that question.

So would he say that, could he say that? Yes, he could say it. Is he right? He may very well be right, but he doesn't have the data yet to support it. We're interested in the answer to that question. And we've provided him with cigarettes to try to address it.

Q You have, I think by your own admission, you said you wrote about 90 articles in the peer-reviewed literature?

A Yes, sir.

Q But you haven't been a peer reviewer?

A Yes, I have.

Q You have? I misunderstood your testimony.

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And of those 90 articles in the peer review literature, how many of them concern themselves with nicotine -- daily doses of nicotine, smoking and health and those issues?

A None, sir.

Q How would you compare what you have done in that area with Dr. Benowitz, just the number of articles in the peer-review literature?

A Well, rather than a number, he is, in my mind, a confident and leading scientist in the area, and one that I hold in high respect.

Q If he were in here in this courtroom and testified that he had published ove 300 peer-reviewed articles, and somewhere around 80 percent of those, so 240, 250 were on the subjects that we have been discussing, smoking and health and nicotine, nicotine addiction, that sort of subject, would you dispute that?

A No. I know his resume, but the point of the question is a non-addicting dose of nicotine. And he has published on this, for instance, in -- if I can mention the journal, The New England Journal that Dr. Jack Henningfield, and that is a theoretical construct in 1998, when we were together in Canada, and the Canadian scientist asked him --

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Q You are not going to launch into hearsay, are you, Doctor?
A Okay.
Q We're asking your opinion, sir.
A My opinion?
Q Not what you are going to repeat, what you think other people --
A You're right, you're right. My opinion is that there was -- there is not sufficient data to allow a regulation that says this is the kind of cigarette you can make that will be nonaddictive.
Q I am not sure I asked you anything about a regulation. I am having a hard time finding the answer to the question I asked you, which was, there is a good body of medical and scientific authority in the peer-reviewed literature outside of your company that says that people smoke for a minimum dose of nicotine on a daily basis?
A Yes, I am not disagreeing with you. My only point is nobody has the data to tell you what that level is.
Q And if Dr. Benowitz were to disagree with you, you would respectfully disagree with him?
A Actually, I would say, "Show me the data."
Q When we get to the issues of smoking and

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health, we really have an underlying assumption that is probably well supported by the science. And that is, as you've already testified, the more tar, the worse it is for the smoker when it comes to being at risk for disease?

A Yes, sir.

Q Really you and I have no dispute on that issue?

A I don't think so.

Q Well, we'll get back to that in a minute. Let's go on to this issue that you mentioned with counsel on the issue of ammonia and additives to cigarettes. You're familiar with documents that show that Philip Morris products have been reverse engineered, so to speak, by your competitor companies?

A Yes, sir.

Q R.J. Reynolds and Brown & Williamson?

A Yes, sir.

Q And they, in looking at your products, the jury has already heard this, but Brown & Williamson at least concluded in 1984, except for ammonia --

MR. PHILLIPS: Excuse me, forgive me, Mr. Wobbrock.

Your Honor, I would like to address the Court with respect to an objection.

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THE COURT: All right. Members of the jury would you kindly step out, please.

(The following proceedings were held in open court, out of the presence of the jury:)

MR. PHILLIPS: May I ask a couple questions in aid of objection.

THE COURT: You may, counsel.

MR. PHILLIPS: You can just sit down, Dr. Carchman.

QUESTIONS IN AID OF OBJECTION

BY MR. PHILLIPS:

Q Counsel is about to ask you some questions about some documents from other companies, sounds like R.J. Reynolds and Brown & Williamson. You are familiar with those documents?

A No, I'm not.

Q Have you had those documents -- did you ever see those documents at any point in time when you were working for Philip Morris?

A No.

MR. PHILLIPS: Your Honor, there's been a ruling in this case with respect to other company documents. This witness, if he's ever seen the

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document, probably has only seen it in response to having it handed it to him by lawyers in the courtroom or lawyers in a deposition.

It doesn't seem to me that opens the door with respect to Mr. Wobbrock's asking questions of this witness about other company documents. It simply violates the rule that the Court entered some time ago that documents from other companies that you can't connect or link to Philip Morris should not be admitted, and should not be recited in the courtroom.

THE COURT: Counsel, your response.

MR. WOBBROCK: Well, I am surprised the doctor has said he's not familiar with it because -- if you'll give me a minute, Your Honor -- I think he said the opposite under oath in another courtroom.

THE WITNESS: I believe what I said, I was familiar about the allegation.

MR. WOBBROCK: You did, sir? I stand corrected.

(Pause in proceedings.)

MR. PHILLIPS: While Mr. Wobbrock is waiting, the point is, of course, that we can't cross-examine the RJR person, we can't cross-examine that B & W person. They're not here. We don't know

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what they said, whether they did it correctly. For all the reasons that the Court excludes these kinds of documents beforehand, I don't think they should come in through the back door here.

MR. DUMAS: I would remind the Court that in the Williams-Branch case, Judge Brown kept these documents out, did not allow them to be used by any party in any portion to the case.

MR. WOBBROCK: The question is this to the witness, Your Honor.

BY MR. WOBBROCK:

Q Do you recall testifying in the Boeken, B-o-e-k-e-n, case in California?

A I remember testifying.

Q You recall Mr. Piuze asking you this question: "What did RJR and B & W say Philip Morris was doing with its Marlboro cigarettes?

"Answer: They concluded that the success of the Marlboro was related to our use of ammonia products in manufacturing process."

Do you recall giving that testimony?

A Absolutely.

MR. WOBBROCK: Okay. And that's as far as I'll go, Your Honor.

MR. PHILLIPS: Well, the point is that --

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I'll ask the witness a couple more questions.
BY MR. PHILLIPS:
Q How have you become familiar with that allegation, through lawyers like Mr. Wobbrock?
A Yes.
Q Do you have any other basis for knowing about it at all?
A No.
Q Have you reviewed the documents or anything else?
A No.
MR. PHILLIPS: I think the objection stands.
MR. WOBBROCK: I don't think it makes any difference, Judge, whether he learned about it as a consultant traveling around the country testifying in cases or whether he learned about it when he was a full-time employee at Philip Morris and not a consultant, what difference does it makes? He still learned about it.
MR. PHILLIPS: Well, excuse me, it's hearsay, Your Honor. If a Court enters an order saying, "We're not going to have documents in this case that are from other companies that can't be explained, that can't be examined, for which there

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can't be any discovery, and defeat that by virtue of having Mr. Wobbrock's predecessor one year removed ask a question about the documents and plant the information for which the witness responds, and thereafter make the witness responsible for the document, then I think it really does defeat the purpose of the Court's order.

MR. WOBBROCK: Well, Your Honor, the Court's order about other documents -- or other companies was about whether or not other people had influenced Michelle Schwarz, other companies had influenced Michelle Schwarz to buy the product. It has nothing to do with this subject.

Second of all, the doctor acknowledges what these documents concluded. Now, he has testified that there is no issue of real significance concerning ammonia, and this evidence is to the direct contrary of that. He's aware of it and I'm entitled to impeach about it.

The document is not going to come in, I'm not going to offer the document, but the fact that he's aware of that certainly goes to the issue about what he has spoken about concerning ammonia, and that's as far as it's going to go.

MR. PHILLIPS: These documents were the

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very precise documents I was most concerned about when I brought the motion regarding other companies. How can you defend a case with respect to some other company's internal analysis of your product which you can either represent that the analysis was incorrect, they're competitors who were in second and third place, maybe they weren't doing as good a job.

How do I know how to respond to those documents? He's creating an inference based on documents this witness has never seen with respect to conclusions he's been told by another plaintiff's lawyer, all of which is hearsay, for purposes of planting the same information in front of this jury, and I'm left in a situation where I can't cross-examine.

I can't call some witness from B & W or RJR to explain. I can't ask this witness to explain those documents because he has not looked at them. It really does put me in a trap, Your Honor. These are the precise documents.

THE COURT: Counsel, let me ask a question. Since the doctor is a qualified expert witness, there is no doubt about that because of his experience and training and his knowledge, doesn't

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keep counsel from asking him a hypothetical question on that issue from that document in the same place.

MR. PHILLIPS: I think with a hypothetical question, it can be asked, Your Honor. I think if he asked, "If I asked you to assume that other companies had reverse engineered the product and concluded that ammonia was there, what do you believe about that?" Then he has to answer the question, it seems to me.

But he can't start reading documents that the jury is never going to see and yet plant all that information that goes to specific analysis and create the inference that this is something that this witness knew about on his job, which obviously is not true. He knew it by virtue of Mr. Piuze.

MR. WOBBROCK: Here's the problem, Judge. I guess Mr. Phillips was gone that day but all of this three paragraphs were read to Mr. Burnley without objection.

MR. PHILLIPS: That wasn't right. I was there that day, but perhaps you weren't. I objected --

MR. WOBBROCK: I read it.

MR. PHILLIPS: Let me make the point. I objected. We came up to the bar -- this is probably

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not on the record because we did come up to the bar, Your Honor -- and I believe it was Dr. Whidby perhaps, or Dr. Burnley, one of those two. I'll bet money on one of those two, Your Honor.

THE COURT: I won't, but go ahead.

MR. PHILLIPS: All right. And the question was: "Have you reviewed and are you familiar with these documents?" And then I said, "Your Honor, this is passing the rule that you've already entered." He says, "Well, he can have an opinion on it," and you allowed the question.

Now, in this case, this witness does not know those documents, has only heard about the documents through Larry Wobbrock the earlier, and that means what they're trying to do here is really try to undermine the Court's order, and put me in a position where I can't defend on this solely by virtue of some predecessor plaintiff lawyer's work in Los Angeles last year.

Now, that's not fair. I mean, I have no objection to the hypothetical that you pose, Your Honor, I think that's fair; but to suggest and give credibility to the document by reading it to the witness, and to create the impression that he actually understands it, knew about it in his job,

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was looking at all the reverse engineering documents his competitors were putting together, is really unfair and puts me at a disadvantage. I think the Court, with respect, should adhere to its previous order and allow only a hypothetical question and not the reading of the document.

MR. WOBBROCK: I'll ask a hypothetical question, Judge, and I'll move on.

THE COURT: All right, let's do it.

Bring the jury.

(The following proceedings were held in open court, the jury being present at 4:25 p.m.:)

BY MR. WOBBROCK:

Q Dr. Carchman, I want you to assume that the competitor companies reverse engineered your Marlboro cigarettes and found them to be chock full of ammonia, and found them, in their opinion, to be the basis of your success with that product. If people in the business had done that, you probably could say that their chemists were competent, could you not?

A You could, yes.

Q And that the people that made that analysis knew what they were doing?

A They might, yes.

Q And you could conclude if you were in

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their shoes, that that is, in fact, the reason for Marlboro's success, could you not?

A I don't believe so.

Q One of the reasons you don't believe so is because you believe that Benson & Hedges and Marlboro are almost an identical product except for the name, correct?

A That's correct.

Q And you think that if this ammonia was found in Marlboro, as said by R.J. Reynolds and Brown & Williamson, as the basis of their success, why wouldn't Benson & Hedges also be successful, correct?

A That's correct.

Q But you would acknowledge, sir, would you not, that the promotion, the advertising, the marketing of Marlboro is much, much more intense than Benson & Hedges?

A I am not knowledgeable at all about what the marketing approaches are for our products. I am the wrong person to ask that question to. And even if it was, I wouldn't know how to respond.

Q When urea is put into reconstituted cigarette tobacco and burned, it turns into ammonia, does it not?

A It can.

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Q And when ammonia is added to tobacco, it increases the pH?
A In commercial cigarettes?
Q Yes.
A I would say sometimes.
Q When urea is added into tobacco and is burned and turns into ammonia, it sometimes increases the pH?
A Depending on specific conditions, sure.
Q And when it increases the pH, it can increase, therefore, the freebased nicotine, correct?
A In what?
Q In the smoke, I'm sorry, when it's burned.
A I am not sure.
Q Okay. Are you familiar with the document going back to 1966, Exhibit 72? It's hard to read.
A Yes, it is.
Q But we'll try. "In an attempt to study the effects of smoke pH on nicotine delivery and cellulose acetate selectivity, cigarettes containing 10 percent by weight amonium carbonate and 10 percent by weight oxalic acid, were prepared and submitted for analysis versus a control rod."
And control rod means one without those additions; is that correct?

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A That's correct.

Q "The cigarettes were analyzed as 85 millimeter cigarettes and 65 millimeter cigarettes, with and without a 20 millimeter cellulose acetate filter. Results of these tests are in Table 1 and 2."

We'll just skip to the conclusion since the hour is getting late. "Conclusions: Nicotine delivery can be controlled via filler or smoke pH adjustment."

Are you familiar with this document back in 1966?

A I have actually seen this document a while ago, so under the conditions of this test with the amount of material that they're adding, they saw this. I would say that if you did that today, you'd probably see something similar to that.

Q It would be fair to say that Philip Morris was interested in finding out how to adjust the amount of freebased nicotine with pH adjustments?

A I would say Philip Morris was interested in many things related to the cigarette including nicotine, and this is just one document, a very, very old document, but still a document that touches upon this.

Looking at more recent -- well, actually,

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not even that recent, but including some recent information, the point is that this amount of ammonia, and this amount -- I don't think we oxalic acid -- but that amount of ammonia is something that you would do in the laboratory, but you wouldn't do and is not done in any Philip Morris cigarettes.

Q You said that's 1966. Let's see how interested Philip Morris was in the subject some 26 years later in 1992, February 5th. Are you familiar about this document from Frank Gullata to Robin Kinser?

A They reported to me. I was then the manager of biochemical research. And Robin Kinser was the section leader, and Dr. Frank Gullata was one of the people who worked for her, so I'm familiar with the work.

Q The jury may be familiar with Robin Kinser's name, in that Ray Morgan was the one who told Robin Kinser about the results in the chamber. And then she went to Cathy Ellis, and came back and told Ray Morgan, according to Ray Morgan, to destroy the results. Are you aware of that?

A I am aware of the allegation, yes.

Q Okay. And you're aware that Robin Kinser is right in the middle of that?

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A What one has to do with the other, I'm not sure; but she's here because she's the section leader reporting to me. And this is one of the areas she was responsible for.

Q Are you familiar with this document?

A Oh, yes.

Q Okay. "This demonstrated a systematic relationship between increases in filler pH and increases in gas phase presumably unprotonated nicotine."

That's freebased nicotine, is it not?

A Yes. Under the conditions of this test, yes, sir.

Q And it also Item 3, similar subject, "Demonstrated the addition of bases to cigarettes enhanced subjective and electrophysiological response."

A That's correct.

Q Bases being increasing the pH?

A With calcium hydroxide, which is something we've never done in any commercial cigarettes.

Q But what you did in that study that Mr. Gullata is listing for you -- and I don't mean you, sir, but I mean your company -- is that somebody took wires and an electroencephalogram and hooked them

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to somebody's head and gave them cigarettes with increased basic substances in it, and then measured their brainwaves?

A That's correct.

Q And another thing that you did was you found -- and, again, sir, I mean your company?

A I understand.

Q You understand?

A I understand.

Q Okay. You found that, again, this is an aerosol, we understand. The jury has seen this before. This is Exhibit 275, this is an aerosol. But you found that, without going through the whole document again, to be fair, I should ask you if you are familiar with this?

A I believe I have seen this.

Q Okay. And the conclusion I want to bring to your --

A Let me just ask, this is another Gullota document, but this time from our institute; is that right?

Q Your Data sheet from the Web page identifies --

A Sorry. I think that's what it is.

Q The point here is that, "The rate of entry

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of nicotine," I am just jumping right to the conclusion.

"The rate of entry of nicotine into the bloodstream is found to be pH dependent with this nicotine aerosol."

Would you agree, sir?

A If that's what it says with that particular aerosol, and the pH he went up to is pH 11. And the next pH was 7.5. Neither of those pHs, are applicable to cigarettes. If you're asking me under laboratory experimental conditions, can you modulate an aerosol or tobacco smoke, my answer is absolutely.

Q Are you aware of your competitors' finding that the pH of your Merit cigarettes --

MR. PHILLIPS: Objection, Your Honor. You have already ruled on this issue.

MR. WOBBROCK: I think I am entitled to ask him if he is just aware of it, Your Honor. I mean, he's aware of what is in the industry.

THE COURT: I'll let you ask the question. Go ahead.

BY MR. WOBBROCK:

Q Are you aware of your competitors' finding that the smoke pH of your Merit cigarettes is 6.4?

A Not specifically, no.

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Q Let me ask if you are familiar with this document. Look at the first --
A No.
Q You've never seen it before?
A No.
Q Okay. This talks about pHs of 5.6, 7.5 and 11.
A That's what it says, yes.
Q And it says, "Since the amount of inhaled nicotine was the same, the results indicate that the higher the pH, the more rapidly nicotine enters the bloodstream."
Are you aware of that finding?
A I am aware of that conclusion and at pH 11, it doesn't surprise me at all.
Q Do you think it confines that conclusion to the pH 11 test?
A I don't know. I would need to look at the actual data. Since the pH of the body is 7.4, a pH difference to 7.5 would be absolutely inconsequential. But a pH of 11, I would believe we would see -- we would see an effect.
In fact, there is actually publications on that. I guess that's hearsay, forgive me. But I am aware of data that had been published that showed this

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many years ago.
Q And you're aware also of the -- I think it was shown to you by your own lawyer, but your company was well aware and has been aware since -- well, many years ago, that pH is correlated with impact?
A That's an old anecdotal story that predates the cigarette industry.
Q But it's something your company has studied and is within the internal documents of your company?
A On pH and impact?
Q Yes.
A I believe so, yes.
Q And maybe it is a good time to change the subject then and we'll go on to something else.
The issue of INBIFO is something that you get exercised about, fair to say?
A You mean people ask me questions? Yes.
Q Well, about the destruction of documents?
A That's come up several times, yes.
Q And you would agree, sir, would you not, that there was a very rigorous and practiced method, at least at one time, perhaps before your time, in which documents that were sent to INBIFO -- or sent from INBIFO to Richmond or New York were done in a

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very careful way?

A I have seen a memo that discusses certain kinds of memos and how they should be handled, yes.

Q This is Exhibit 168. Is this the one that you have seen, sir?

A Yes, sir.

Q And this talks about, does it not, being very careful about the copies that might be floating around?

A Yes, sir.

Q This is to Dr. Haussermann in Switzerland?

A Yes, sir.

Q From Dr. Seligman who was the head of R & D?

A In Richmond, yes. Dr. Haussermann was the head of R & D in Neuchatel.

Q It says in here, "I received a copy of Helmut Gaisch," G-a-i-s-c-h, "March 24, 1977, letter to Jerry Osmalov," O-s-m-a-l-o-v, "concerning pesticide residue analysis.

"As you were copied, you know that Helmut was requesting that we send examples directly to INBIFO. This suggested procedure is in direct conflict with our communications from the New York office. We have gone to great pains to eliminate any

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written contact with INBIFO, and I'd like to maintain this structure."

Now, this was in 1977. That is before your time?

A Yes, sir.

Q And I take it you're saying this is a foreign practice to your familiarity?

A Well, yes. When I came to the company, INBIFO was not doing any chemical analysis of pesticides, number one. I think they were in the past. As to how documents flowed back and forth, the documents I was involved in and the kinds of documents that my predecessor and his predecessor were involved in did not flow this way.

Q "Therefore, I am advising Jerry Osmalov to continue sending samples to Neuchatel for transhipment to INBIFO. If this procedure is unacceptable to you perhaps you should consider to dummy mailing address to Cologne," meaning Cologne, right?

A That's right.

Q That the in Germany?

A Yes.

Q "For the receipt of samples. The written analytical data will still have to be routed through FTR," that's Neuchatel?

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A Yes, sir.
Q "If we are to avoid direct contact with INBIFO and Philip Morris USA. I'll leave it to you to decide what route we will follow."
That's an elaborate procedure to avoid an contact or evidence of contact between the two entities, is it not, sir?
A It was strange to me then. It remains strange to me now.
Q "In any event, I would suggest retrieve the March 24th letter Helmut Gaisch sent to Jerry, including all copies. My copy is returned herewith. I look forward to your comments. Robert Seligman."
Now, sir, if that practice was followed to the letter -- do you sense from that letter -- that letter, by the way, that communication, that's a slight little tap on the wrist. "Let's follow the procedures"?
A That's how I read it.
Q That's how I read it, too. When you sensed that tap on the wrist, wouldn't it be fair to say that when one high executive taps another maybe slightly lower executive on the wrist, people are going to pay attention?
A One would think that's what would happen,

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yes.

Q And when they pay attention, they're going to make sure there is not loose copies flying around?

A Sure.

Q And if there only individual copies of what they thought at that time were sensitive documents, and they were then sent to Tom Osdene and he destroyed them, you would never know they ever existed, would you, sir?

A No. I think my interpretation of this document had to do with copies and not the original -- not the original documents. But what somebody else did in a previous time that I wasn't there clearly wasn't evidenced by my search through the INBIFO, INBIFO files, and their accounting system for who got what and when, and who returned it to the institute.

Q Just to bring back everybody to where we were earlier on this, probably a month ago, you have heard it being testified to that this is a memo of Dr. Osdene's informing the reader -- or it's a diary.

"If important letters or documents have to be sent, please send to home. I will read them and then destroy."

Are you aware of that?

A No. I am aware of this memo, and I've

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been told to assume that Dr. Osdene wrote it. I have no reason to think he did or didn't do it; but having looked at this several times, could Dr. Osdene have destroyed documents? Yes. If this he were documents generated by INBIFO and what he destroyed were copies of documents.

Q If they were very careful about how many copies were made and all the copies that were made following Dr. Seligman's instructions were destroyed, you likely would never know about it.

A The copies, no; but the original documents, yes.

Q And we're talking thousands if not hundreds of thousands of documents, are we not?

A Millions of pages.

Q Millions of pages?

A Yes.

Q And you're not saying you reviewed every one?

A Absolutely not.

Q And you're not saying you followed the trail of one referring to another and being able to figure out if all the documents in a set are there?

A For all of them?

Q Yes.

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A No. But having said that, and knowing the Germans, I think in somebody paid somebody enough money, I would not be surprised if you could find out where every single darn document went and whether they got it back or not.

Q Well, your company had a practice of creating situations where they could maintain what's called deniability?

A And deniability is?

Q You know what deniability means.

A I know what my kids sometimes do, but you're maybe using it in a formal sense. I am not sure I understand.

Q I am using it in the sense that it was asked you under oath previously. Do you recall that?

A Deniability?

Q Yes.

A In what context?

Q Let me see if you remember this question and this answer. This is Page 38 of the Williams matter.

"Now, you are familiar with the term called deniability?

"Answer: I think I know what that means.

"Question: Tell the jury what does

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deniability mean.

"Answer: To deny something, to reject something.

"Question: And is it sort of a term that says that if a person acts in a particular way or a company acts in a particular way, they can maintain deniability about something that might be controversial if they had to admit?

"Answer: I guess so. I really don't know. This sounds more like legal than scientific."

Do you recall that testimony?

A Do I call that testimony?

Q Do you recall that testimony, sir?

A Not specifically, but I am pretty comfortable with what I said then and what I'm trying to say now.

Q Well, let me ask you if this is a situation that would help maintain a memorandum that reflects a situation that would help maintain deniability.

This is March 21st, 1980. This is to Dr. Seligman from Dr. Dunn, the nicotine receptor program. You've seen this document before, have you not, sir?

A Yes, sir.

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Q And this is Exhibit 200 for the jury. And we'll just set the scene by reading the first paragraph.

"In responding to your query, I am going to first address the more inclusive topic of the psychopharmacology of nicotine. Abood's nicotine receptor program is included as is the internal nicotine analog program, and the internal animal behavior program. All three of these efforts are aimed at understanding that specific action of nicotine which causes the smoker to repeatedly introduce nicotine into his body."

Then it goes on and says, "The psychopharmacology of nicotine is a highly-vexatious topic. It is where the action is for those doing fundamental research on smoking and for where most likely will come significant scientific developments profoundly influencing the industry. Yet it is where our attorneys least want us to be for two reasons."

And I am going to skip a little bit, here just for the time's sake. The jury will have this with them. I am sure you will point out to me, sir, if I skip anything important.

"The first reason is the oldest and most implicit in the legal strategy employed over the

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years. In defending corporations within the industry from claims of heirs and estates of smokers. Quote, 'We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted of biological systems.'"

Do you see that statement in quotes?

A I see the quotes, yes.

Q And that would set up as of 1980 a situation of deniability, corporate deniability on behalf of Philip Morris, would it not?

A I don't know. If you want to ask that question about corporate deniability, ask a lawyer. I had no idea that Dr. Dunn was an attorney.

Q I didn't say he was an attorney. If you got that from me, I didn't mean --

A No. No, I know he wasn't an attorney.

Q Oh, I'm sorry.

A But he sure does sound like he is trying to speak like an attorney.

Q I see, I see. So is it your testimony here to this jury that that sentence, "We, within the industry," in quotes, "are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological

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systems."

Is that not an effort to announce the deniability strategy of Philip Morris?

A No. I can't answer that question because I am still trying to understand what vexatious means. Nor do I have any handle on where he got that quote, where he got that quote from.

Q Looking further in this document, he mentioned two reasons.

"Which brings us to our second concern of our attorneys. This is a more recent concern arising from increasingly favorable prospects for the success of a legislative effort to transfer authority for the regulation of tobacco manufacture to a federal agency," paren, FDA."

Food & Drug Administration, right, sir?

A Yes.

Q "Known to have interest and powers antithetical to the interests of the industry. Any action on our part such as research on the psychopharmacology of nicotine, which implicitly or explicitly treats nicotine as a drug, could well be viewed as a tacit acknowledgment that nicotine is a drug.

"Such acknowledgment, contend our

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attorneys, would be untimely. Therefore, although permitted to continue the development of a three-pronged program to study the drug nicotine, we must not be visible about it."

Not being visible about studying nicotine is a form of deniability, is it not, sir?

A If you say so, but when I read this it seemed to be almost schizophrenic from the following perspective. If we shouldn't be doing this, that's exactly what we're doing. If we're concerned about regulation by the FDA, then the nicotine analog that had the central effects without the cardiovascular effects, and to put that in there would invite -- directly invite a regulatory thrust.

So it seems to me, I don't know what he was on when he wrote this, but this whole thing is schizophrenic and carries with it what I have called the Dunn patina, trying to embellish and make things seem more important coming from him than they really are. As I said, he is not a lawyer, and he is talking like a lawyer.

He then takes some sort of legal extrapolation and says, "We really can't be doing this." And yet the whole program, Dr. Abood's nicotine analog part, the smoking behavior part. It

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seems to be in direct conflict with what he is saying, "Gee, we shouldn't do it and we're doing it."

Q It's only in conflict if people like the FDA and people like this jury find out about it; isn't that true?

A No, sir. If we had developed a nicotine analog program that met that objective, the goal was to take nicotine out of the cigarette and put that in -- I mean, when I found out about this, I was asked to review the data. I just thought, what the dickens is going on here. This is just crazy.

And to put a foreign substance, in a cigarette to replace nicotine, you don't have to be a scientist. I could have asked one of my kids what would have happened, they would have said what I'm going say. You directly invite the Federal Government to come in and take a serious look at what you are doing. To do research on nicotine behavior, most of the which -- the date of this memo, forgive me is --

Q 1980.

A Is 1980. A lot of the best work on nicotine had already been done on the outside. There was nothing that Philip Morris was doing on nicotine research that was original except for the nicotine analog program. Everything else, I would best

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describe without insulting my colleagues is derivative in nature. There was nothing new going.

If he wants to worry about the FDA and the lawyers want to worry, my personal feeling was when I looked at it, it doesn't make any sense to put up this kind of verbiage. Go ahead and do research and then think about adding foreign substance to cigarettes to replace nicotine. I mean, I felt I was I missing something here in this connection.

Q Just so the jury isn't missing something, what does "clandestine" mean?

A Hidden or secret. Hidden or secret, yes.

Q And if this program is kept secret then the risks, again, of the FDA finding out and the risks of people like this jury finding out are much minimized, aren't they?

A If, indeed, it was kept secret. I knew about parts of this before I came to Philip Morris, because Dr. DeNoble, I think I said earlier, would come over to the department and talk to us about the research he was carrying out. Plus he published some of this stuff. So the only secret part had to do with the early parts of the analog, the analog program, of which they never found an analog that satisfied their objective.

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Q We'll talk about Dr. DeNoble and what happened to him later. But in any event, sir, the suggestion of this memo is to do exactly as we have discussed, is it not?

"Our attorneys, however, will continue to insist upon a clandestine," which you defined as hidden, "effort in order to keep nicotine, the drug, in low profile."

A They were doing work and they were publishing some of it. I don't know how clandestine.

Q Are you talking about Dr. DeNoble's efforts to publish?

A Yes.

Q Are you familiar with the fact that Dr. DeNoble was threatened by a Philip Morris lawyer if he published an article?

A No.

Q You're not familiar with that?

A No, I am not.

Q Are you familiar with the fact that Dr. DeNoble was fired?

A I know he left the company. The precise conditions under which he left, it could have been consistent with discharge, yes, but I don't know. That was before my time.

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Q Are you familiar with the fact that his lab was shut down overnight?
A I knew his lab was shut down. I wasn't aware -- I don't know the precise conditions under which that occurred.
Q So the Tom Osdene situation, that memo was before your time?
A Which memo?
Q The Max Haussermann letter and the Osdene memo that says, "I'll destroy the documents, you send them to my house."
A I think he said, "I'll destroy the copies."
Q That was before your time?
A Yes, sir.
Q This recent document that we just looked at that talks about clandestine to study nicotine was before your time, correct, 1980?
A Actually, if you wouldn't mind putting it up.
Q 1980, sir.
A If you wouldn't mind putting that up, please, the clandestine part?
Q Page 2.
A Well, they obviously failed.

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Q They failed after the Master Settlement Agreement was made this public?
A No. I think they failed before then to keep it clandestine.
Q That will be for the jury to sort out.
A Yes, sir.
THE COURT: Counsel, we're so close to 5:00. Are you going into another area now?
MR. WOBBROCK: I've got two more questions.
THE COURT: All right.
BY MR. WOBBROCK:
Q The INBIFO copy destruction, as you call it, memo, in a letter from Dr. Seligman to Dr. Haussermann was before your time?
A Yes, sir.
Q The memo that we just looked at in 1980 was before your time?
A Yes, sir.
Q Are you familiar with this document?
A Yes, I am.
Q To Dr. Osdene from Dr. Dunn.
"I have given Carolyn approval to proceed with this study. If she is able to demonstrate, as she anticipates no withdrawal effects of nicotine. We

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will want to pursue that avenue with some vigor. If, however, the results of nicotine are similar to those gotten with morphine and caffeine. We will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original I have."

Are you familiar with that?

A Yes, sir.

Q This was before your time also?

A I guess, but when I saw it I became agitated and I went down to central files. And I asked them to give me everything they had on nicotine and Dr. Levy, in terms of her notebooks. I found her notebooks. I found the data. I also looked to see what was in the literature at the time and I found three or four peer-reviewed published citations --

Q Sir, maybe you could you just answer my question.

A Yes, sir.

Q That was before your time?

A Yes, sir.

Q By choosing you to come to this courtroom, Philip Morris has chosen someone with complete deniability, have they not, sir?

MR. PHILLIPS: Objection. That was argumentative. The witness was not allowed to

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complete his last answer.

MR. WOBBROCK: It wasn't responsive. I have no further questions.

MR. PHILLIPS: The witness hasn't --

THE COURT: The Court will strike the last question. The witness may answer the last question if you wish.

MR. PHILLIPS: Thank you, Your Honor.

THE COURT: The last question.

THE WITNESS: Thank you, Your Honor. As I said, looking at this memo really got me upset. And I ended up going within Philip Morris' central files and asking them to give me anything they had on Dr. Levy and nicotine from the date that preceded this until after this.

I found her data book that covered a year or more in which the data on this experiment was contained within central files. I then asked -- I found the data. I found the notebook. I then asked the library to search for me in that period of time, and before this question of nicotine withdrawal. I came up with three publications by well respected scientists in the peer-reviewed literature and answered this question using a better system than the one Dr. Levy was using.

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This was just, to me, another example of Philip Morris in this area doing research that has been done by others; and, therefore, it was not clear to me at all what the concern was, since the issue had already been addressed by other people. But that was just -- that was just me then and it's pretty much how I feel today.

THE COURT: All right. Thank you. We will conclude our day at this time, members of the jury. Leave your notebooks in the jury room, don't discuss the case, and be back in the jury room at 8:55 in the morning. Thank you.

(The following proceedings were held in open court, out of the presence of the jury at 5:02 p.m.:)

THE COURT: Court is out of session.

MR. DUMAS: Your Honor, I have some matters to put on the record. It doesn't involve Dr. Carchman. He can stay or leave as he sees fit.

THE COURT: He is going to help out the Court Reporter.

Okay. Counsel, go ahead and proceed.

MR. DUMAS: Thank you, Your Honor. After much discussion between myself and Mr. Lane, and some discussions with Mr. Tauman, I believe we have

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reached an agreement as to a significant number of exhibits, defendant's exhibits. I am not going to take the time to read all the numbers, there are quite a few of them.

But they deal with what Mr. Tauman and I sort of call the mass media exhibits. These are newspapers articles and magazine articles in the first section, and we have agreed that those can be admitted into evidence and will be admitted into evidence, with the understanding that they are not being admitted to show the truth of the matter asserted in any article. Simply that they were published in those respective magazines and newspapers.

MR. TAUMAN: I would like to qualify that so there is no misunderstanding at this point in time. Because there are two subsets of these documents that require further foundation which I am assuming will come from the witness.

Those are those documents that are not -- when we talk about mass media documents, mass media materials, they are not all documents. Those are materials that were basically distributed or available nationwide on broadcast television, nationwide magazines and newspapers that were

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nationwide and things like that.

I believe those -- Mr. Dumas indicated that those are intended to show, knowledge -- I don't want to put words in his mouth -- but knowledge of all people in the United States. Then there are a subset of these that are not self-authenticating. Those are things like public service advertisements.

Something that comes from the broadcast news that says, "ABC," these are mass media. We don't need any more foundation. Public service advertisements may never have seen the light of day, so these need a further foundation in order to get our agreement that they be admitted.

And the second qualification are documents that are intended to show direct notice or knowledge of Michelle Schwarz. In other words, aren't intended to show knowledge that everyone knows, but what she may have known. Those require an additional foundation of showing that she had access to those documents and some indication that she may -- that the jury can infer that she may have had exposure to them.

MR. DUMAS: I guess I agree with all that, with the understanding that the exhibit numbers that

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Mr. Lane and I talked about refer -- many of them refer to the Oregon Statesman Journal, newspaper articles when Michelle Schwarz lived in Salem. And Chicago Harold Tribune and Gullata News and Sun News and all those kinds of things. Okay. And with regard to PSAs, I understand in order to be admitted we are going to provide some kind of foundation.

THE COURT: Right. Because sometimes those are produced and not aired.

MR. DUMAS: That's true, or not published.

The next housekeeping matter, Your Honor, from my perspective is Exhibit No. 652. That is the Modern Biology Textbook that we talked about. I've been told that plaintiff has no objection other than lack of completeness.

As the Court knows, there was a dialog with Mr. Garrelts about the book. He identified the book extensively. He said this was the book that he used. This was the book that was in the classroom. And what we have, what I've offered as Exhibit 652 is Chapter 42, which is the chapter that deals with alcohol, narcotics and tobacco.

I've offered the entire chapter. I've also offered the front page, the copyright page, the title page, the preface page, and the two-page table

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of contents which lists all of the other chapters. I don't have anything else other than what I've offered here.

I do have an expanded version of 652 which contains a couple of other chapters. If counsel wants that in, he is certainly welcome to it.

MR. TAUMAN: Your Honor, Mr. Dumas is correct, we did discuss this before. Our only objection is one of completeness, which I believe is required for authenticity. I believe, if I recall -- and I may be confusing this with another document. On the second page is a bar code from the Kanakkee Public Library. So this book was copied from the Kanakkee Public Library.

Obviously, whoever did the copying had access to the whole book. What we have here is simply one chapter of the book. For all I know, and I don't, I don't claim to know this, for all I know the other chapters may have information that in some way conflicts with this.

I think that there is a basic rule of authenticity that the whole document has to prove its authenticity -- a different agreement than a small portion. I think we have a basic agreement that each party can introduce small portions of

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voluminous documents like the Surgeon General's report, that's fine. But there has been no agreement in this case.

THE COURT: So you object to the chapter being introduced?

MR. TAUMAN: That's correct, on the basis of authenticity, Your Honor.

MR. WOBBROCK: Your Honor, the witness laid the foundation for it. He said this was a portion of the book. He said it was a copy of the book. He said it was a copy of the book in the classroom that he used, that he used from his lectures -- to prepare his lectures. There is no legitimate basis to keep this out. There is no legitimate argument that Chapter 42 is misleading to this jury, Your Honor.

THE COURT: Can I see that? I haven't seen that. I don't want to see the other one.

(Pause in proceedings.)

THE COURT: Now, counsel, you know what I would be inclined to do, I guess that's part of life. If you are not Solomon, you can't come up with the great wisdom that makes everybody happy and still be right.

This chapter deals with alcohol. We don't

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have any alcohol in this case. It talks about drinking alcohol and not drinking and driving. Alcohol in society, alcohol and driving, how alcohol effects the driver.

Then it shows a car turned up on its top. "If you drive, don't drink. If you drink, don't drive. Accidents such as this often result when drinking and driving are mixed." I just love that to scare high school kids with, showing the car turned upside down and tell them not to drink and drive.

That has absolutely nothing to do with this case. I want this document redacted to tobacco, starting on Page 529. All the rest of it is out. That is in.

MR. DUMAS: We can do that, Your Honor.

THE COURT: All right.

MR. WOBBROCK: Thank you, Your Honor.

MR. TAUMAN: Thank you, Your Honor.

MR. WOBBROCK: 9 o'clock, maybe to 12:30 at the latest.

MR. DUMAS: Your Honor, the tobacco goes on Pages 529 and 530.

THE COURT: Start off indicating where we are starting.

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MR. DUMAS: Would I keep the title page and table of contents?

THE COURT: All right. Court is out of session.

(Court adjourned, Volume 40-C, at 5:10 p.m.)

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REPORTER'S CERTIFICATE

I, Katie Bradford, Official Reporter of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I reported in stenotype the oral proceedings had upon the hearing of the above-entitled cause before the HONORABLE ROOSEVELT ROBINSON, Circuit Judge, on March 7, 2002;

That I have subsequently caused my stenotype notes, so taken, to be reduced to computer-aided transcription under my direction; and that the foregoing transcript, Volume 40-C, Pages 1 through 80, both inclusive, constitutes a full, true and accurate record of said proceedings, so reported by me in stenotype as aforesaid.

A transcript without an original signature and red CSR seal is not certified.

Witness my hand and CSR Seal at Portland, Oregon, this 23rd day of August, 2002.

_____

Katie Bradford, CSR 90-0148
Official Court Reporter

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